

REMARKS

In response to the Final Office Action mailed on March 5, 2009, Applicants respectfully request that the claims be amended as set forth in this Amendment. Accordingly, a Request for Continued Examination is submitted herewith.

I. Claim Amendments

Claims 1, 27, and 31 are hereby amended to clarify that a container resulting from the recited method has an oxygen-scavenging property that is stable during unfilled storage and is activated as a result of filling the container with an aqueous fluid. Support for this amendment may be found throughout the application, including Table 1 on page 29 and associated text.

In order to expedite prosecution, claim 1 is further amended to recite that the oxygen scavenging material is present in the preblend in an amount of 20 to 2,000 parts per million ("ppm"), by weight. Applicants reserve the right to pursue the broader claim (i.e., prior to amendment) in a continuing application.

In order to expedite prosecution, claim 27 is further amended to recite that the base polyester consists essentially of virgin bottle grade polyester. Applicants reserve the right to pursue the broader claim (i.e., prior to amendment) in a continuing application.

II. Status of Claims

Claims 1-3, 5-12, 14-21, and 25-33 are pending in the instant application. In the Final Office Action, claims 1-3, 6-15, 17-21, and 25-33 stand rejected as being obvious over Speer (US 5,211,875) in view of Collette (US 5,759,653); claims 1-3, 6-15, 17-21, and 25-30 stand rejected as being obvious over Collette; and claims 31-33 stand rejected as being obvious over Nilsson in view of Collette.

Pages 2-16 of the Final Office Action appear to be identical to pages 2-17 of the preceding Office Action. To the extent that page 2-16 of the Final Office Action may be pertinent to the amended claims, the remarks contained in Applicants previous response dated November 17, 2008 are incorporated herein. Accordingly, the

following discussion focuses primarily on the “Response to Arguments” section appearing on pages 16-21 of the Final Office Action.

III. Speer in view of Collette

Claims 1-3, 6-15, 17-21, and 25-33 stand rejected under 35 U.S.C. 103(a) as being obvious over Speer (U.S. 5,211,875) in view of Collette (U.S. 5,759,563). Applicants traverse these rejections to the extent, if any, that they may be asserted to be applicable to the amended claims.

A. Independent Claim 1

Amended independent claim 1 recites a method for forming a container from a preblend that includes, among other things, 20 to 2,000 ppm, by weight, of an oxygen scavenging material. As recited in clause (f), the container resulting from the recited method is stable during unfilled storage and has a barrier layer with an oxygen scavenging property that is activated after filling the container with an aqueous fluid, wherein activation results from filling.

As acknowledged in the Final Office Action, the primary Speer reference does not disclose forming a preblend as recited in claim 1. To overcome this deficiency in Speer, the Final Office Action looks to Collette and argues that it would have been obvious to modify the Speer method to include the masterbatch step of Collette.

However, even *arguendo* if a skilled artisan were motivated to combine the teachings of Speer in view of Collette as proposed, the resulting combination would not include all of the features of claim 1.¹

First, neither the primary Speer reference nor the secondary Collette reference teaches a method for forming a container having a barrier layer with an oxygen scavenging property that is activated after filling the container with an aqueous fluid, wherein activation results from filling. The primary Speer reference teaches a method

¹ Applicants do not concede that a skilled artisan would be motivated to make the proposed combination of Speer in view of Collette.

of initiating oxygen scavenging by exposing the scavenging composition to radiation.² The secondary Collette reference teaches accelerated activation prior to filling through incorporation of substantial amounts of post-consumer PET ("PC-PET").³ Neither reference discloses or suggests a composition wherein activation results from filling.

Moreover, neither Speer nor Collette teaches a preblend that includes 20 to 2,000 ppm by weight of oxygen-scavenging material. Speer is silent as to using a preblend as recited in claim 1 and Collette teaches including 3,000 to 6,500 ppm of oxygen-scavenging material in the Collette masterbatch (see pages 11-12 below for additional discussion).

It is therefore respectfully submitted that independent claim 1 and dependent claims 2, 3, 5-12, 14-21, 25, 26, 29, 30, and 33 are allowable over Speer and Collette.

B. Independent Claim 27

As amended, claim 27 recites a method for producing a plastic container having a barrier layer formed from an admixture including a preblend and a base polyester consisting essentially of a virgin bottle grade polyester. Claim 27 has also been amended to clarify that the resulting container has a barrier layer with an oxygen scavenging property that is activated after filling the container with an aqueous fluid, wherein activation results from filling. Accordingly, the base polyester recited in claim 27 does not include amounts of ingredients (e.g., unsuitable amounts of water, etc.) that would materially affect the stability of the plastic container during unfilled storage and cause activation prior to filling.

It is respectfully submitted that amended claim 27 is allowable over Speer and Collette. Even *arguendo* if the proposed combination of Speer in view of Collette were made, the resulting method would not include all of the features of claim 27. First, as discussed above with regards to claim 1, neither Speer nor Collette teaches a method for forming a container having a barrier layer that is activated after filling and

² See, e.g., Speer at col. 2, lines 53-66.

³ See Appendix A in Applicants' previous response dated November 17, 2008 which includes multiple Collette citations demonstrating activation prior to filling and, e.g., Paragraph 2 of the Collette Summary.

as a result of filling. Moreover, neither Speer nor Collette teaches forming a barrier layer from an admixture including (i) the preblend recited in claim 27 and (ii) a base polyester consisting essentially of a virgin bottle grade polyester. Speer is silent as to utilizing a preblend and Collette teaches mixing a masterbatch with substantial amounts of PC-PET for accelerated activation prior to filling.⁴

It is therefore respectfully submitted that claims 27 and 28 are allowable over Speer in view of Collette upon entry of the claim amendments.

C. Independent Claim 31

Independent claim 31 also stands rejected as being obvious over Speer in view of Collette. As amended, independent claim 31 recites a method for forming a monolayer container that is stable during unfilled storage and has an oxygen scavenging property that is activated when the container is filled with an aqueous fluid, wherein activation results from filling. It is respectfully submitted that amended claim 31 is allowable over Speer and Collette.

As discussed above with regards to claim 1, neither Speer nor Collette teaches a method for forming a container having a barrier layer that is activated after filling and as a result of filling. Moreover, Collette teaches against monolayer constructions due to the purposeful inclusion of substantial amounts of PC-PET in the Collette scavenger layer in order to achieve accelerated activation. Collette explicitly teaches that a multilayer design should be employed to protect food products from contacting contaminants or scavenging materials and byproducts present in the core scavenging layer.⁵

It is therefore respectfully submitted that claims 31 and 32 are allowable over Speer and Collette upon entry of the claim amendments.

⁴ See, e.g., Paragraph 4 of the Collette Summary.

⁵ See, e.g., Summary at paragraph 3, sentences 1 and 3; and Summary at paragraph 4, sentence 1; col. 8, lines 26-28; col. 9, lines 37-38; col. 9, lines 49-50; col. 10, lines 20-22; and claim 1.

II. Collette

Claims 1-4, 6-15, 17-21, and 25-30 stand rejected under 35 U.S.C. 103(a) as being obvious over Collette. Applicants respectfully traverse these rejections to the extent, if any, that they may be asserted to be applicable to the amended claims.

A. Independent Claim 1

As amended, independent claim 1 recites a method for making a container that includes the step of forming a preblend that includes, among other things, 20 to 2,000 ppm of an oxygen-scavenging material. Contrary to the assertions of the Final Office Action regarding cancelled claim 13, Collette does not disclose including such a concentration of oxygen scavenging material in the Collette masterbatch, but rather discloses including a much higher concentration.

At page 5, the Final Office Action asserts that “Collette et al teach an oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million, by weight and comprises cobalt or metal complexes thereof (col. 10, lines 24-37).” The relevant portion of the Collette passage cited by Final Office Action in support of the foregoing assertion is the following:

One skilled in the art can determine without much difficulty which concentration is appropriate in each blend, but in general it will be a range of 50-10,000 ppm by weight, and more preferably 50-1,000 ppm.
(Col. 10, lines 32-36).

Contrary to the assertions of the Final Office Action, the above passage does not disclose including 50-1,000 ppm in the Collette masterbatch. When read in the context of the Collette reference as a whole, the 50-1,000 ppm concentration clearly refers to the concentration of catalyst in the first blend, which is formed by diluting the Collette masterbatch with PC-PET.⁶ Consistent with this usage, 3,000 to 6,500 ppm is the only catalyst concentration specifically disclosed for the Collette masterbatch,

⁶ See, e.g., Paragraph 4 of the Collette Summary.

appearing both in the summary and claims sections.⁷ While Applicants can only speculate, the markedly higher concentration of catalyst in the Collette preblend likely contributes, at least in part, to the accelerated activation of the Collette barrier layer prior to filling, which Collette expressly desires.

Moreover, Collette does not teach a method for forming a container having the features recited in clause (f) of claim 1. As previously discussed at length on the record, the Collette scavenging layer is inherently activated during production prior to filling.⁸ As such, the container resulting from the Collette method does not possess the features recited in clause (f). Such properties recited in a process claim are proper and can not be ignored. (See, for example, MPEP 2116.01 which states that “[i]nterpreting the claimed invention as a whole requires consideration of all claim limitations. Thus, proper claim construction requires treating language in a process claim which recites the making or using of a nonobvious product as a material limitation.”) No reasoning has been provided why, or how, a skilled artisan would modify the Collette method to produce a container having the properties of clause (f).

Thus, for the foregoing reasons, claims 1-3, 5-12, 14, 15, 17-21, 25-26, and 29-30 are neither anticipated nor rendered obvious by Collette.

B. Independent Claim 27

Independent claim 27 stands rejected as being obvious over Collette. For the same reasons as discussed above in regards to the rejection of claim 27 over Speer in view of Collette, it is respectfully submitted that amended claim 27 is allowable over Collette. That is, Collette teaches (i) a method for forming a container with a scavenging layer that is inherently activated during production before filling and (ii) blending substantial amounts of PC-PET with a masterbatch to form the scavenger layer. As such, Collette teaches neither (b) nor (f) of amended claim 27. It is therefore submitted that independent claim 27 and dependent claim 28 are allowable over Collette.

⁷ See, Paragraph 4, last sentence, of the Collette Summary section and claim 29.

⁸ In particular, see Appendices A and B from Applicants' previous response dated November 17, 2008.

III. Nilsson in View of Collette

Claims 31-33 stand rejected under 35 U.S.C. 103(a) as being obvious over Nilsson (U.S. 5,034,252) in view of Collette. The Office Action asserts that Nilsson discloses all of the features of independent claim 31, but is silent to the preblend process of step (a) and mixing the preblend with the base polyester. To overcome this deficiency, the Office Action persists in asserting that it would have been obvious to incorporate the method of Collette into that of Nilsson to achieve improved mixing of the constituent materials. Applicants respectfully traverse this assertion.

Again, neither Nilsson nor Collette teach a method for making a container having a barrier layer with an oxygen-scavenging property that is activated after, and as a result of, filling. Therefore, even if the proposed combination of Nilsson in view of Collette were to be made, the resulting container would still be activated before filling.

Moreover, in order to make such a combination, a skilled artisan would need to ignore each of the following teachings from Nilsson and Collette:

- (i) Nilsson teaches that highly improved oxygen barrier properties can be achieved if the material in the Nilsson preform or container is allowed to undergo an aging process prior to container filling.⁹
- (ii) Collette teaches to include an amount of PC-PET in the scavenging layer sufficient to achieve accelerated activation of the scavenging layer prior to container filling.
- (iii) Collette further teaches to position an inner layer between the core scavenging layer and the filled product to protect the filled product from contact with the oxygen scavengers, its byproducts, or PC-PET contaminants.

Applicants submit that a skilled artisan would not be motivated to ignore each of these fundamental teachings. It is respectfully submitted that to conclude otherwise is to exercise impermissible hindsight.

⁹ See, e.g., Nilsson at col. 3, lines 14-23 and col. 6, lines 12-19.

Thus, Applicants respectfully submit that claims 31 and 32 (which depend from claim 31) are in condition for allowance.

CONCLUSION

In view of the foregoing, all of pending claims 1-3, 5-12, 14-21, and 25-33 are in condition for allowance. Reconsideration and prompt allowance of all pending claims is respectfully requested. The Commissioner is authorized to charge any additional fees associated with this paper or credit any overpayment to Deposit Account No. 50-2070.

Respectfully submitted,

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